NO. 48842-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent,

v.

DOUG AND ALICE KRISTENSEN

(Conveyance #7610),

Appellants.

BRIEF OF APPELLANTS KRISTENSEN

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I. INTRODUCTION

On September 27, 1989, William T. O'Hara of the Department of Labor & Industries (the Department) issued Doug and Alice Kristensen a permit to install a Rehmke tram to reach their King County home. In reliance upon that permit, the Kristensens contracted for the tram's purchase and installation. After construction, the Department inspected, tested and approved the tram. Over the next several years, the Department required the Kristensens to make certain improvements to their tram and the Kristensens fully complied. The Kristensens spent approximately $65,000 purchasing the tram and paying for Department permit and approval fees, engineering, construction and related costs.

Since 1997, due to a change in the law, the Department has not had the legal authority to inspect the Kristensens' tram, nor has an operating permit been required. Nonetheless, in 2013, the Department "red-tagged" the Kristensens' tram. Its stated basis for doing so was that the Department's own actions in granting multiple prior approvals of the tram did not comply with its long-since repealed rule, WAC 296-94-170(2).

The Kristensens appealed the Department's red-tag to the Office of Administrative Hearings and moved for summary judgment on grounds that the Department was equitably estopped from asserting its red-tag because the Department had approved and reapproved the Kristensens'

tram, the Kristensens relied upon those approvals in expending the funds to construct the tram, the Kristensens would be injured if the Department were allowed to repudiate its prior approvals, estoppel is necessary to prevent a manifest injustice, and estoppel would not impair governmental functions. In response to the summary judgment motion, the Department did not refute any facts the Kristensens put forth. Instead, it argued in essence that it had made a mistake in its 1989 permitting and subsequent approvals of the tram and that, while the Department previously had believed the Rehmke tram was safe, current Department personnel did not.

After extended oral argument and denial of the Department's motion for reconsideration, the Administrative Law Judge (ALJ) concluded that the Department was equitably estopped from red-tagging the Kristensens' tram and entered an order containing twenty-eight findings of fact based on clear, cogent and convincing evidence, as well as detailed conclusions of law.

The Department petitioned for review to Thurston County Superior Court, claiming that the ALJ had erroneously applied the law or, alternatively, that the ALJ's order was arbitrary and capricious. The Superior Court reversed the ALJ's order, based on its determination that the ALJ had erroneously interpreted or applied the law in its conclusions of law. Although the Superior Court's order fails to identify any particular conclu-

sion of law that the Superior Court found to be an erroneous application of law, it appears from the Superior Court's oral ruling that it reversed the ALJ because it believed there was an issue of fact as to whether the Kristensens established all five elements of equitable estoppel by clear, cogent and convincing evidence.

II. ASSIGNMENTS OF ERROR

The Superior Court erred in reversing both the ALJ's findings of fact that the Kristensens had established all five elements of equitable estoppel by clear, cogent and convincing evidence and the ALJ's conclusion of law that the Department was equitably estopped from red-tagging the Kristensens' Rehmke tram.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Did the Kristensens, as the ALJ found, establish the elements of equitable estoppel by clear, cogent and convincing evidence such that the Department of Labor and Industries is equitably estopped from red-tagging their Rehmke tram?

(2) If this Court affirms the ALJ's determination that the Department is equitably estopped from red-tagging the Kristensens' tram, should this matter be remanded to the Superior Court for a determination of reasonable attorney fees under RCW 4.84.350?

IV. STATEMENT OF THE CASE

A. Factual Background.

In 1989, Alice and Doug Kristensen purchased their family residence at 26251 Marine View Drive South, Kent, Washington. AR 3, ALJ Findings of Fact 4.5-4.9. As the home could not be reached by motor vehicle, it was necessary to construct an outdoor tram. *Id.* In researching potential tram manufacturers, the Kristensens could find only one in the Pacific Northwest – Rehmke Products Corporation. *Id.* The installation contractor they hired submitted an Installation Application to the Department on September 25, 1989, reflecting their plan to install a Rehmke Products Corporation Mark 12 Hillside Tram with a positive engagement hook on car. *Id.*

The Department approved the application for the Rehmke tram on September 27, 1989 and issued a permit. AR 3, ALJ Findings 4.10-4.11. The Department charged and the Kristensens paid a $245.30 permit fee to the Department, as well as an additional $20 fee for checking plans. *Id.*

The Kristensens would not have purchased and installed the Rehmke tram without the Department's approval. In the absence of such approval, the Kristensens would have contracted with a different manufacturer, one whose product the Department approved. AR 3, ALJ Finding 4.13. The Kristensens were not the only persons for whom the

Department approved and re-approved the Rehmke Mark 12 safety hook tram as, at least up to 2002, the Department had approved and re-approved such trams for several others. AR 4, ALJ Finding 4.14.

Construction of the Kristensens' tram began in early 1990 and was completed in June 1990. AR 4, ALJ Findings 4.15-4.18. On June 12, 1990, the Department inspected the Kristensens' tram and required some additional work prior to final inspection. *Id.* On October 2, 1990, the Department again inspected the tram and again required additional work. On March 15, 1991, after inspecting the Kristensens' tram again, the Department reported that "all acceptable tests [were] performed [and] [n]o apparent deficiencies were found." *Id.*

In July 1992, the Department inspected the Kristensens' tram again and determined that, under Department regulations, the landing gates required a combination electrical/mechanical interlock. AR 4, ALJ Finding 4.19. The Department also required the Kristensens to install a car-mounted speed governor assembly on their tram. *Id.* In October 1992, the Kristensens performed the upgrades at a cost of $4,773.00. *Id.* On October 23, 1992, the Department confirmed the Kristensens' compliance in these regards. *Id.*

On November 5, 1992, the Department issued the Kristensens an operating permit for their tram. AR 4, ALJ Findings 4.20-4.22. On

August 9, 1994, the Department authorized a variance for the Kristensens' tram so that they could have an "on-off key switch" rather than a momentary key switch. *Id.* On October 3, 1994 the Department inspected the tram and reported that "no apparent deficiencies were noted." *Id.*

At no time during the permitting, construction and approval of the Kristensens' tram did the Department prohibit the Rehmke tram the Kristensens purchased and installed. Rather, the Department consistently approved it. AR 4-5, ALJ Finding 4.23.

Since the tram was installed, it has been the Kristensens' primary means of accessing and leaving their home. AR 5, ALJ Findings 4.25-4.26. The Kristensens' tram has never been open to the public. The tram has not been relocated or altered since the Department last inspected it. *Id.* The Kristensens spent approximately $65,000 to purchase, permit and install the tram, including making Department-required upgrades and paying Department-charged fees. *Id.*

In 1997, the Legislature restricted the Department's authority to inspect private residence conveyances such as the Kristensens' tram to circumstances involving new, altered, or relocated conveyances and accident investigations unless an annual inspection and operating permit are requested by the owner. Laws of 1997, Ch. 216, §2; RCW 70.87.120(b)(i). In 2004, the Legislature again limited the Department's

authority over private residence conveyances not accessible to the general public by allowing them to be repaired by the owner or at the direction of the owner without any requirement that the person performing the repair work be licensed by the Department and without any Department inspection. Laws of 2004, Ch. 66, §3; RCW 70.87.305.

Notwithstanding its lack of authority to inspect the Kristensens' tram, which was not new, had not been altered or relocated, and had not been involved in any accident, in 2013, the Department red-tagged the Kristensens' tram. AR 5, Finding 4.24. A red-tag is an order to cease operation of the tram. *Id.* Since then, the Department has never advised the Kristensens what specifically they must do to have the red-tag removed.[1] *Id.* The basis for the Department's red-tag was not because the Kristensen tram had become unsafe,[2] but rather because the Department changed its opinion and decided that the tram had been unsafe since the Department initially approved it in 1989. AR 10.

B. Procedural Background.

The Kristensens timely appealed the Department's red-tag, AR 277-279, and then moved for summary judgment, AR 201-56. The

[1] At most, in response to the Kristensens' summary judgment motion before the ALJ, the Department indicated that the Kristensens might not need to replace the tram, but would need to replace the safety hook with "a code compliant and safe," but otherwise unspecified, safety device. *See* AR 5, ¶4.28; AR 157.

[2] Indeed, the Department submitted no evidence that any Rehmke tram had ever failed or caused personal injury to anyone.

Kristensens sought a finding and order that the Department was equitably estopped from issuing the red tag. *Id.* The Kristensens also requested a finding and order that the Department was precluded from red-tagging the Kristensens' tram for violating a former and repealed Department rule, AR 207, 211-13, as well as a finding and order that the Department had issued a 1989 blanket approval for all Rehmke trams,[3] AR 213-14, 237-38, 251-56. After extensive briefing and oral argument, the ALJ entered a Final Order Granting Appellants' Motion for Summary Judgment. AR 26-39. The Department then moved for reconsideration, and after additional briefing and oral argument, the ALJ entered a Corrected Final Order Granting Appellants' Motion for Summary Judgment. AR 1-20. Because the ALJ granted the Kristensens' motion for summary judgment on equitable estoppel grounds, the ALJ did not consider or decide the other issues the Kristensens raised on summary judgment. *See* AR 2, ¶2.2, AR 11, ALJ Conclusion of Law 5.25.

The Department petitioned for review to the Thurston County Superior Court, CP 4-25, claiming that the Kristensens "did not meet their proof burden on all five of the [equitable estoppel] elements by clear,

[3] The Kristensens' evidence that the Department had issued a blanket approval of Rehmke positive hook trams came from the Department's own files. AR 237-38, 251-56. The manufacturer, Rehmke Products Corp., went out of business in 2000, Mr. Rehmke is deceased and there are no known corporate records other than those in the Department's files. AR 237-38. The Kristensens' evidence of the Department's blanket approval of the Rehmke tram was unrebutted.

cogent and convincing evidence ...." CP 7. The Department did not assign error to any of the ALJ's findings of fact. In its oral ruling, the Superior Court determined that the Kristensens did not meet their burden of proof on all of the elements of equitable estoppel by clear, cogent and convincing evidence.[4] RP 10. The Superior Court then entered its Findings of Fact, Conclusions of Law, and Judgment, stating that the ALJ "erroneously interpreted or applied the law" and that the ALJ's conclusions of law "constitute a reversible error of law." CP 70.

V. ARGUMENT

A. Administrative Procedure Act Standards of Review.

Once the Superior Court has issued a final decision on judicial review of an administrative decision, the aggrieved party may seek review in the Court of Appeals. RCW 34.05.526. The appellate court "sits in the same position as the superior court and reviews the Board's decision by applying the standards of review in RCW 34.05.570 directly to the agency record," *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000), not to the superior court decision, *Chancellor v. DRS*, 103 Wn. App. 336, 341, 12 P.3d 164 (2000) (citing *Franklin County*

[4] It appears from the Superior Court's oral ruling that the court did not agree with the ALJ's finding that the Kristensens had proved by clear, cogent and convincing evidence the fourth and fifth elements of equitable estoppel (that estoppel is necessary to prevent a manifest injustice and that estoppel would not impair governmental functions), RP 9, but when the Kristensens' counsel inquired, the Superior Court would not limit the issues on remand to those two elements, RP 10.

Sheriff's Office v. Sellers, 97 Wn.2d 317, 323-34, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983)). Because the appellate court sits in the same position as the superior court, it gives no deference to the superior court's ruling. *Verizon NW, Inc., v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

RCW 34.05.570(3) sets forth the standards of review of agency orders in adjudicative proceedings. In its appeal to the Superior Court, the Department sought relief from the ALJ's order under subsections (d) and (i) of RCW 34.05.570(3), which provide:

> The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> * * *
>
> (d) The agency has erroneously interpreted or applied the law; [or]
>
> * * *
>
> (i) The order is arbitrary or capricious.

The party challenging an administrative order, here the Department, bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Postema*, 142 Wn.2d at 77.

Where, as here, the original administrative decision was on summary judgment, "the reviewing court must overlay the [Administrative Procedure Act] standard of review with the summary judgment standard." *Verizon NW*, 164 Wn.2d at 916. The facts in the administrative record are reviewed *de novo*, and in the light most favorable to the non-moving party.

Id. The ALJ's legal determinations are reviewed using the "error of law" standard. *Id.* Summary judgment is appropriate if the undisputed facts entitle the moving party to judgment as a matter of law. *Id.*

B. The Kristensens Established the Elements of Equitable Estoppel by Clear, Cogent, and Convincing Evidence.

Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975).

When equitable estoppel is asserted against the government, the party asserting it must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claims, (2) the asserting party acted in reliance upon the statement or action, (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action, (4) estoppel is "necessary to prevent a manifest injustice," and (5) estoppel will not impair governmental functions. *Silverstreak, Inc. v. Dep't of Labor and Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007). Here, the Kristensens set forth specific facts establishing each element of equitable estoppel by clear, cogent, and convincing evi-

dence, and the Department failed to offer evidence to rebut any element.

1. A statement, admission, or act by the party to be estopped, which is inconsistent with its later claims.

The Department regularly approved and issued permits for Rehmke Mark 12 trams, the same tram the Kristensens installed. As demonstrated in the agency record, between the Department's multiple inspections and approvals of the Kristensens' and others' Rehmke trams, no less than the Department's Williams T. O'Hara (AR 222, 240, 244, 246), Robert F. Romero (AR 225, 228, 232, 245, 247), Jan Gould (AR 234-5, 241), Howard Long (AR 233, 242), Bob Hoeschen (AR 250), and Becky Ernstes (AR 248, 249) all approved the installation, modification and/or operation of the Rehmke Mark 12 tram.

Ultimately, to justify its subsequent red tag of the Kristensens' tram in 2013, the Department claimed that the Rehmke Mark 12 tram failed to comply with WAC 296-94-170(2) which, while in effect when the Department had approved the tram, had been repealed in 2001. Even assuming the Department was correct and the Rehmke Mark 12 tram did not comply with the Department's since-repealed rule, the Department's multiple acts in approving the tram are inconsistent with its current position. Moreover, then as today, the Department had the legislative authority to modify or waive the requirements of RCW 70.87 *et seq.*

which would necessarily include its own rules. RCW 70.87.110. Hence, the Department had the ability to issue a blanket waiver for the Mark 12 tram, as Mr. Rehmke has said it did. AR 256. But even if it did not, the Department plainly issued the Kristensens an approval and multiple re-approvals, which are inconsistent with the Department's current claim.

2. The asserting party acted in reliance upon the statement or action.

As Mr. Kristensen stated in his declaration, AR 218, ¶3, the Kristensens relied upon the Department's approval of the Rehmke Mark 12 tram in making their decision to purchase and install it at their principal residence. They would not have purchased the Rehmke tram but for the Department's approval. *Id.* The tram cost was significant. AR 20, ¶10. The Department did not and could not dispute the Kristensens' reliance on the Department's approval and re-approvals of the tram.

3. Injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action.

The "injury" element requires the party asserting equitable estoppel to show a detrimental change of position based upon the government's representation. *Silverstreak*, 159 Wn.2d at 889. As the court stated in *State ex. Rel Shannon v. Sponburgh*, 66 Wn.2d 135, 143-44, 401 P.2d 635 (1965), a matter involving the Washington liquor control board:

> The conduct of government should always be scrupulously just in dealing with its citizens; and where a public

> official, acting within his authority and with knowledge of the pertinent facts, had made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.

As previously noted, the Kristensens would not have purchased the Rehmke tram but for the Department's approval. There is no dispute that the Department's change of position would injure the Kristensens because they would be deprived of their tram as the only realistic access to their home, or in the alternative, would be required to incur the significant cost of a new tram or the cost of as yet unspecified repairs.[5]

4. Estoppel is necessary to prevent a manifest injustice.

In *Silverstreak*, 159 Wn.2d at 890, the court held that:

> If contractors and subcontractors cannot rely on the consistency of clear department [of Labor & Industries] interpretations in effect at the time they enter into a contract, they are left to guess at the meaning of regulations. Thus the result the Department urges us to reach would not only be manifestly unjust but unconstitutional.

Here, the same analysis applies. If homeowners cannot rely on the Department's approval of conveyances such as the Rehmke Mark 12 tram, they will have little to no idea whether they are wasting their money making a significant purchase. The Department's position that it is free to approve (and re-approve on multiple occasions) a conveyance and then

[5] The Department has not advised the Kristensens of the specifics of what, if anything, they could or should do to their tram in order for the Department to remove the red-tag. AR 220; *see also* footnote 1, *supra.*

flip-flop its position years later is manifestly unjust.

5. Estoppel will not impair governmental functions.

Application of estoppel in this instance could not conceivably cause any impairment of governmental functions because such a ruling would be limited to a red-tag on a single tram that is privately owned and not available for public use.

Washington courts look to public policy considerations to determine whether application of any equitable defense interferes with the proper exercise of governmental duties. *Kramarevcky v. Dep't of Soc. and Health Servs.*, 64 Wn. App. 14, 25, 822 P.2d 1227 (1992), *aff'd*, 122 Wn.2d 738 (1993) (citing *Housing Auth. v. Northeast Lk. Wash. Sewer & Water Dist.*, 56 Wn. App. 589, 593, 784 P.2d 1284, 789 P.2d 103, *rev. denied*, 115 Wn.2d 1004, (1990)). As the *Kramarevcky* court noted:

> We consider relevant to this inquiry which party could best have prevented the mistakes that occurred and who is in the better position to assure that future errors of this kind do not occur. Here, that party is DSHS. The regulatory scheme does not place the burden of determining eligibility on the recipient. Thus, when all information is accurately and timely provided by the recipient, it is appropriate to put the burden on the government to assess eligibility accurately in light of the information provided.

Kramarevcky, 64 Wn. App. at 25-26. Here as well, if a mistake was made, it was the Department that made the mistake in issuing the Kristensens a permit, charging the Kristensens various fees and continually approving

the tram. To refuse to apply equitable estoppel in a case like this would only serve to encourage "inefficient bureaucracy." *See Kramarevcky*, 64 Wn. App. at 26 n. 11 ("It has been suggested that when a court refuses to apply estoppel in an appropriate situation, the court encourages inefficient bureaucracy.") (citing 14 GONZ. L. REV. 597, 606 (1978-1979)).

C. There Is No Legislative Abrogation of the Estoppel Principles.

In response to the Kristensens' summary judgment motion, the Department submitted no evidence that a Rehmke tram had ever failed or caused personal injury to anyone. Nonetheless, the essence of the Department's position has been equitable estoppel principles should be disregarded because its sole motivation is the Kristensens' personal safety.

> [E]stoppel principles have been recognized in Washington for at least the last 100 years. *See, e.g., Spokane St. Ry. v. Spokane Falls*, 6 Wash. 521, 33 P. 1072 (1893) (city estopped from claiming it did not authorize building of railroad tracks). The court is therefore reluctant to find an abrogation of estoppel principles absent a clear showing of legislative intent.

Kramarevcky v. Dep't of Soc. and Health Servs., 122 Wn.2d 738, 749, 863 P.2d 535 (1993).

Here, RCW 70.87 *et seq.*, Elevators, Lifting Devices and Moving Walks, governs the Department's ability to regulate private residence conveyances. The Kristensens' tram is a "private residence conveyance" because it is a conveyance installed in or on the premises of a single-

family dwelling and operated for transporting persons or property from one elevation to another. RCW 70.87.010(33).

In 1997 the Legislature amended RCW 70.87.120 by adding a new subsection (b), which provides in pertinent part:

> (b)(i) Private residence conveyances operated exclusively for single-family use shall be inspected and tested only when required under RCW 70.87.100 or as necessary for the purposes of subsection (4) of this section [accident investigation] and shall be exempt from RCW 70.87.090 unless an annual inspection and operating permit are requested by the owner.

Laws of 1997, Ch. 216, §2. There is no dispute that the Kristensens' conveyance is at a private residence and operated exclusively for single-family use. It is not a new installation, and has not been relocated or altered. Thus, the Department had no authority to inspect the Kristensens' tram after 1997.

In 2004, the Legislature went one step further to insulate private residence conveyances from Department scrutiny by enacting RCW 70.87.305. That statute allows private residence conveyances not accessible to the general public to be repaired by the owner or at the direction of the owner without any requirement that the person performing the work be licensed for conveyance work by the Department and without any Department inspection. The Kristensens' tram is a private residence conveyance not accessible to the general public.

Thus, under current law, the Department may not inspect the Kristensens' tram, and no kind of operating permit is required. Nor are there any legal restrictions regarding the persons that the Kristensens may employ to maintain or repair their tram.

Nothing in RCW 70.87 *et seq* demonstrates a "clear showing" of legislative intent to abrogate equitable estoppel principles. To the contrary, since the Kristensens installed their tram, the legislature has twice acted to curtail the Department's authority with respect to private residence conveyances such as the Kristensens' tram. While the Department's purported consideration of the Kristensens' personal safety may be laudable, it does not justify abandonment of equitable estoppel principles under Washington law, especially given the limitations the Legislature has placed on the Department's authority over private residence conveyances.

D. If the ALJ is Affirmed, the Court should Order a Remand to the Superior Court.

In their Brief in Response to the Department's appeal to the Superior Court, the Kristensens requested an award of reasonable attorney's fees under RCW 4.84.350. CP 61-62. That statute allows a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees up to a maximum amount of twenty-five thousand dollars, unless the court finds that the

agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought. The definition of a qualified party is contained in RCW 4.84.340(5).

If this Court affirms the ALJ's determination that the Department is equitably estopped from red-tagging the Kristensens' tram, this Court should then remand the case to the Superior Court to determine whether the agency action was substantially justified, whether circumstances make an award unjust, whether the Kristensens are qualified parties, and whether expenses and reasonable attorney's fees should be awarded up to the allowable maximum.

VI. CONCLUSION

The Kristensens established each element of equitable estoppel against the Department by clear, cogent and convincing evidence. The purpose of summary judgment is to avoid a useless trial. *Lamon v. McDonnell Douglas*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). Reasonable people could not differ that the Department repeatedly approved the Rehmke tram and that the Kristensens relied upon those approvals to their detriment. Not having inspected that tram for at least the last 17 years, the Department's red-tag can only be interpreted as a

change in Department position which has caused injury to the Kristensens. Estoppel is necessary to prevent a manifest injustice and will not impair governmental functions The Department should be equitably estopped from asserting its red-tag under Washington law.

Thus, this Court should reverse the Superior Court's Findings of Fact, Conclusions of Law, and Judgment, affirm the ALJ's Corrected Final Order Granting Appellant's Motion for Summary Judgment, and remand this matter to the Superior Court for a determination of attorney's fees and expenses pursuant to RCW 4.84.350.

RESPECTFULLY SUBMITTED this ___ day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 6th day of July, 2016, I caused a true and correct copy of the foregoing document, "Brief of Appellants Kristensen" to be delivered in the manner indicated below to the following counsel of record:

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Carrie A. Custer, Legal Assistant

FAIN ANDERSON, ET AL.

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